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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 611

Z. E. EAGLESTON,
Petitioner,

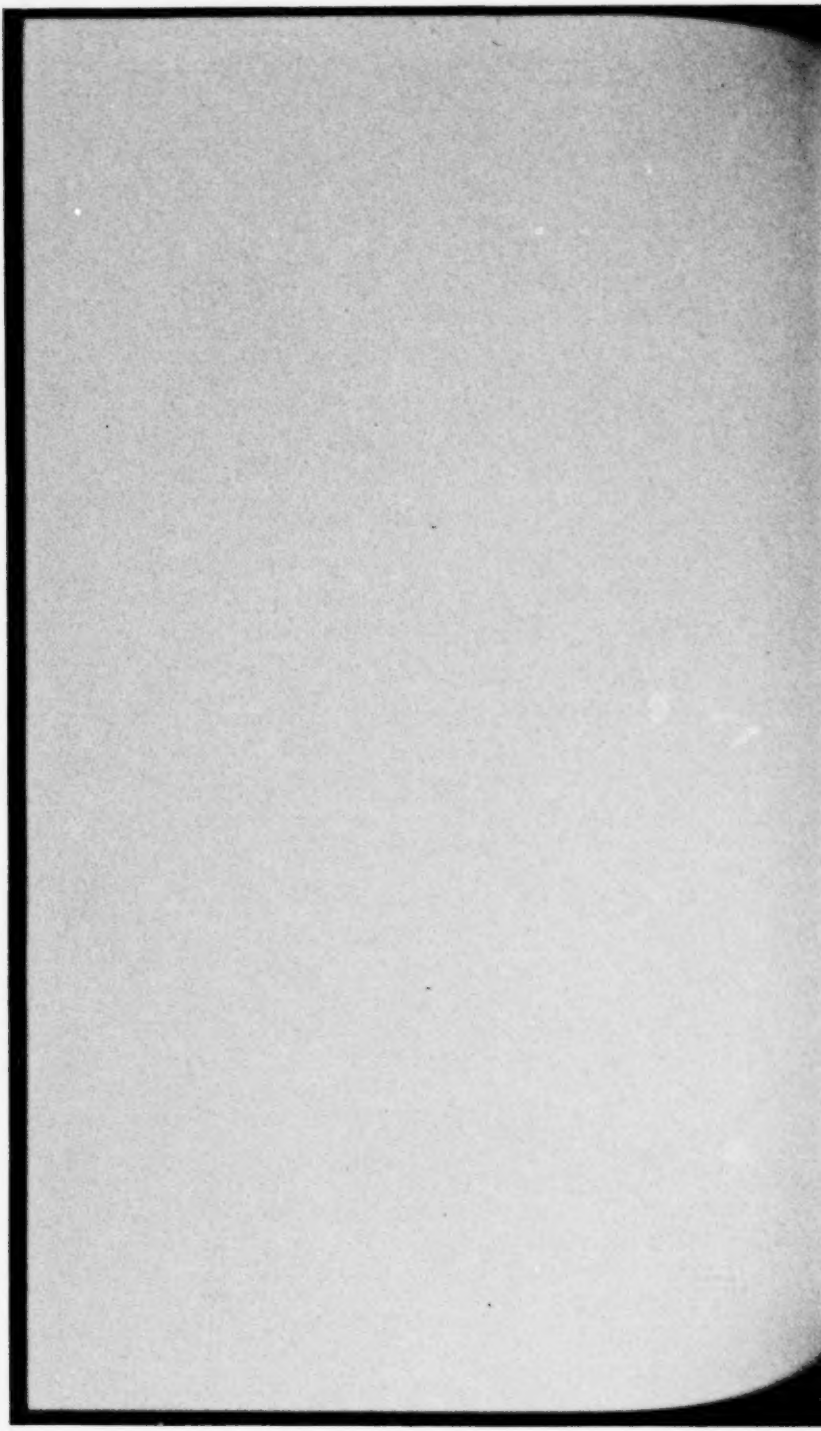
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

Z. E. EAGLESTON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Z. E. Eagleston for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, respectfully shows:

STATEMENT OF THE CASE AND OF THE MATTER INVOLVED.

Z. E. Eagleston, the petitioner, was charged in an indictment returned by the Grand Jury for the Territory of Alaska, Third Division, with the crime of assault with a dangerous weapon upon one Frank Rowley in violation of Section 4778, Compiled Laws of Alaska (R. 2). He entered a plea of not guilty. After a trial by jury, he was found guilty as charged in the indictment (R. 24). Motions for a new trial (R. 24) and in arrest of judgment (R. 31) were denied (R. 36); petitioner was thereupon sentenced to prison for a period of three years (R. 38).

From the foregoing judgment and sentence petitioner duly appealed to the United States Court of Appeals for the Ninth Circuit (R. 39) on the grounds, among others:

1. The trial Court erred in giving to the jury Instruction No. 4D (R. 11) wherein the trial Court wrongfully assumed in its charge that the petitioner had committed an assault upon the complaining witness and attempted to hit and injure the complaining witness with his fist. Both of these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

2. The trial Court erred in giving to the jury Instruction No. 4 (R. 8-9) wherein the trial Court disclosed to the jury the lesser punishment which might be imposed by the Court upon conviction of the included offense of assault, but failed to indicate to the jury the greater punishment provided for the

crime charged in the indictment. The greater punishment was, in fact, meted out by the trial Court.

Respondent Court of Appeals on January 7, 1949, rendered its decision (R. 468) and filed an opinion affirming the judgment and sentence (R. 449). Petitioner thereupon, on February 2, 1949, sought a rehearing before said Respondent Court of Appeals, which was denied on February 4, 1949 (R. 469).

The incident out of which the indictment arose occurred in Anchorage, Alaska, about 8:45 A.M. on July 30, 1946 (R. 48). Petitioner, at that time, was the owner of a salvage yard where second-hand equipment was sold (R. 189). The complaining witness, Frank Rowley, was an electrical worker and at this time was engaged in installing an electrical system in Mt. View, Alaska (R. 171).

Petitioner and Rowley had had a previous discussion about the purchase of an oil tank (R. 171-172).

On July 30, 1946, at about 7:30 A.M., Rowley, together with one Ken Hinchey, went to petitioner's salvage yard in Anchorage, Alaska, for the purpose of purchasing and taking away the oil tank. Petitioner was not there at the time (R. 173). George Miles, an employee of petitioner, arrived at the yard shortly thereafter (R. 173). Rowley told Miles that he wished to buy the tank for $150 (R. 248). Miles replied that he thought this was a low price and asked Rowley whether he had talked to petitioner about it. Rowley said he had not. Miles then suggested that Rowley see petitioner about the price (R.

248). Rowley and Miles got into Rowley's pick-up truck and began to hunt for petitioner (R. 248). They first went to petitioner's house. He was not there. They went to the Alta Club (R. 190) and then circled back to petitioner's house and entered the back yard from the alley in the rear of the house (R. 190). Dave Foote, petitioner's truck driver and handyman, was in the back yard at the time (R. 190, 248).

Rowley and Miles entered the house through the rear door, crossed a hallway and knocked at a door leading to petitioner's bedroom (R. 181, 248). Petitioner came to the bedroom door and said, "What the hell is your hurry, can't you wait a few minutes?" (R. 248, 415). Miles told petitioner that Rowley was ready to take the oil tank from his junk yard, and that Rowley insisted that the purchase price was $150 (R. 191, 415). Petitioner maintained that the price of the tank was $250 (R. 191, 249, 416). After some argument between them over the price, and after Miles left the house and went into the yard (R. 191, 249), petitioner finally told Rowley the price was either $250 or nothing, and said: "Now, don't call me a liar in my own house." (R. 416, 192, 96). Rowley stepped outside the rear door and replied: "You are a liar." (R. 416, 90, 96). Petitioner at that time was standing in the doorway of his house (R. 90, 175).

Miles testified that when he was five or six feet outside the door, he heard petitioner tell Rowley that the latter could not argue with him in his own house. This was immediately after Miles had left the house (R. 249). Miles also heard petitioner tell Rowley,

"You can't call me a liar" (R. 192). Furthermore, Rowley said something to petitioner that Miles could not hear, but Miles did hear petitioner immediately thereafter say, "Take off your glasses" (R. 249). Rowley took off his glasses and laid them on a stove just outside the door (R. 416).

Petitioner took off his glasses and put them on a box (R. 90). Both men put up their hands and started to spar (R. 91, 416, 127, 279).

At this time Miles and Foote were in the yard. Behind Rowley in the yard was a wood and trash pile (R. 78, Exhibits 1 to 4, R. 52-54) about two feet from the door of the house (R. 227). On the right of the yard, facing the alleyway, was a shed against which tools, implements and junk were strewn (Exhibits 1 to 4, R. 52-54; 97).

There is a conflict as to who struck the first blow. Petitioner testified that Rowley struck first (R. 416). Rowley claimed that petitioner struck first (R. 175); in this he was corroborated by Foote (R. 91) and Miles (R. 192, 249). Louis Strutz, who had driven into the alley for the purpose of picking up a carton from among the rubbish in the alley (R. 254), testified that Rowley was facing petitioner with clenched fists (R. 279).

The evidence is also conflicting as to the details of the altercation that followed. Petitioner testified:

> "As he took off his glasses and laid them down, we were sparring around (demonstrating)—we were hitting at one another and I was fast get-

ting out of breath, and there were two or three blows he struck me that would have been counted. And as he hit me, I hit him on the left side, which caused him to turn around. I hit him and give him a shove and he got on the ground. He started to get up and I stepped back with my foot behind my—I grabbed ahold of the rake and lifted it up in this position." (R. 417).

Petitioner further testified that he grabbed the rake because he became winded grappling with Rowley and wanted him to stop—that he (petitioner) was through and wanted the fight to be through; that he wanted only to scare Rowley (R. 417) and did not strike him with the rake or with any other implement or weapon (R. 418).

Corroborating petitioner's contention that he was trying to withdraw and end the fight, is the testimony of Foote who said that as Rowley was falling the *first* time petitioner was backing away from him toward the door of his house (R. 91, 93).

All that Rowley recalls is that petitioner struck him once with his fist (R. 175) and he went backwards, rolled over on his left side and tried to pick himself up (R. 176) and that petitioner subsequently picked up an instrument and raised it over his head (R. 177).

Rowley felt a pain in his head (R. 177). However, he was unable to state definitely whether he felt this sensation of pain before or after he fell to the ground (R. 178).

Miles, who, at the time of the trial had been discharged by petitioner (R. 189), testified that petitioner struck Rowley with a rake after Rowley was on the ground (R. 193, 249).

Foote testified petitioner hit Rowley with his right hand and that Rowley fell on his right side into the woodpile (R. 91, 96), rose two-thirds of the way up and again fell, this time on his left side, head first against the wall (R. 92, 93, 97, 98); that there were shovels, rakes and a pick up on a shed toward which Rowley fell and that they were falling off the shed as Rowley fell toward it (R. 97).

While Foote testified he took a rake from petitioner's hand while Rowley was on the ground (R. 97), he repeatedly testified that he never saw petitioner strike Rowley with it (R. 97, 121). Moreover, Foote testified that after Rowley fell his head was resting on a blood-stained shovel (R. 112, 122) in a wood pile (R. 91) which contained a number of other tools (R. 110).

Strutz testified that although he saw petitioner wield a long-handled instrument, he did not see him strike anybody with it (R. 255, 259, 264, 265, 282).

Petitioner testified that he picked up a rake while Rowley was on the ground (R. 417-8).

There is an abundance of evidence substantiating petitioner's position that Rowley's injuries resulted from a fall into the woodpile while he was sparring with petitioner (R. 91, 96, 101, 115, 120, 121, 175, 417).

Instructions No. 4D and No. 4 given by the trial Court are as follows:

4D. "Even if you should believe that Rowley called the defendant a liar, in words or substance, on the day of and before the alleged commission of the crime charged in the indictment, the use of such words by Rowley and his application of them to the defendant would not justify an assault by the defendant upon Rowley, whether the defendant was or was not then armed with a dangerous weapon.

It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States.

4. "* * * If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon. The law provides that the defendant may be found guilty of an offense necessarily included in the offense charged in the indictment. The offense or crime which is known as 'assault' is necessarily included in the crime of assault with a dangerous weapon charged in this indictment.

The provision of our laws with respect to the crime of assault reads as follows:

> 'Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, shall be fined not more than $500.00 or imprisoned in the federal jail not more than six months, or both.' "

In its opinion the Respondent Court of Appeals does not mention the trial Court's wrongful assumption of material facts in issue, nor does it comment upon the trial Court's disclosing to the jury the lesser punishment which might be imposed upon conviction of the included offense of assault and its failure to indicate to the jury the greater punishment for the crime charged in the indictment, which punishment was meted out to petitioner.

The action of the Respondent Court in affirming the conviction was in direct conflict with decisions of this Court and decisions of the Respondent Court and other Federal Courts of Appeals holding that a trial Court cannot assume, in its instructions, material and controverted facts that should be left to the jury for determination, and should not disclose a lesser punishment to the jury without disclosing the greater punishment provided for the crime charged in the indictment.

JURISDICTIONAL STATEMENTS.

(1) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U.S.C.A., sec. 347).

(2) The decision and judgment of Respondent Court was rendered on January 7, 1949 (R. 468). A petition for rehearing was denied by Respondent Court on February 4, 1949 (R. 469).

(3) The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

Where the decision of Respondent Court is in conflict with applicable decisions of this Court or where such decision is in conflict with applicable decisions rendered by United States Courts of Appeals in other circuits, and in this circuit, this Court has jurisdiction on certiorari to review the action of Respondent Court.

See:

Rules of the Supreme Court, Rule 38, subsection 5(b);

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 253, 85 L. ed. 1313, 1315;

Ansaldo San Giorgio I v. Rheinstron Bros. Co., 294 U.S. 494, 495-6, 79 L. ed. 1019;

Starr v. U. S., 153 U.S. 614, 38 L. ed. 841;

Ruhlin v. New York Life Ins. Co., 304 U.S. 203, 204-205, 82 L. ed. 1292;

Triplett v. Lowell, 297 U.S. 638, 644, 80 L. ed. 953;

Burtnett v. U. S. (C.C.A. 10th), 62 Fed. (2d) 452, 456;

Sturcz v. U. S. (C.C.A. 3rd), 57 Fed. (2d) 90, 92;
Ward v. U. S. (C.C.A. 9th), 4 Fed. (2d) 772, 773;
Pincolini v. U. S. (C.C.A. 9th), 295 Fed. 468, 470;
Jackson v. U. S., 48 App. D. C. 272, 277, 278.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. The trial Court erred in giving to the jury Instruction No. 4D.

The trial Court wrongfully assumed in its charge that petitioner *had* committed an assault upon Rowley and *had* attempted to hit and injure Rowley with his fists. Both of these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

2. The trial Court erred in giving to the jury Instruction No. 4, wherein the trial Court disclosed to the jury the lesser punishment which might be imposed by the trial Court for a violation of the included offense of assault, and failed to indicate to the jury the greater punishment provided for the crime charged in the indictment, to-wit, assault with a dangerous weapon.

This instruction could easily have induced the jury to render a verdict of guilty of the crime charged

in the indictment in the belief and on the assumption that the trial Court would impose the lesser punishment disclosed in the instruction; as a matter of fact, the trial Court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

3. The action of Respondent Court in affirming the conviction was in conflict with comparable decisions of this Court, Respondent Court and other Federal Courts of Appeals of other circuits.

REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

It is petitioner's contention:

First, that in giving Instruction No. 4D the trial Court wrongfully assumed: (a) that petitioner *had* committed an assault upon Rowley; and (b) that petitioner *had* attempted to hit and injure Rowley with his fists. Both of these material facts were in issue, controverted and disputed and were matters to have been determined by the jury. The opinion of the Respondent Court of Appeals upholding such action of the trial Court is contrary to comparable decisions of this Court and other Courts of Appeals, such as the cases of:

Starr v. U. S., supra;
Burtnett v. U. S., supra;
Sturcz v. U. S., supra;
Ward v. U. S., supra;

Pincolini v. U. S., supra;
Jackson v. U. S., supra.

Second, that the opinion of the Respondent Court of Appeals completely omitted any reference to or discussion of Instruction No. 4 given by the trial Court, wherein the trial Court disclosed to the jury a lesser punishment which might be imposed for the included offense of assault, while failing to disclose the greater penalty which might be, and was, imposed upon conviction of the crime charged in the indictment. In ignoring this point and affirming the conviction, the Respondent Court of Appeals acted in direct conflict with the case of *Miller v. U. S.*, 37 App. D.C. 138, 143, and in conflict with the weight of authority of the decisions of state courts upon this point.

For the reasons herein stated petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
February 16, 1949.

Respectfully submitted,
GEORGE T. DAVIS,
SOL A. ABRAMS,
Attorneys for Petitioner.

ANTHONY E. O'BRIEN,
Of Counsel.



CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for petitioner in the above entitled cause and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
February 16, 1949.

SOL A. ABRAMS,
Of Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

Z. E. EAGLESTON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION AND JUDGMENT OF THE COURT BELOW.

The decision and opinion of the Respondent Court was rendered and filed on January 7, 1949 (R. 467, 468).

A petition for rehearing was denied by the Court below on February 4, 1949 (R. 469).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended (28 U.S.C.A., sec. 347).

The grounds on which the jurisdiction of this Court is invoked are fully set forth in the petition filed herewith under the heading "Jurisdictional Statements", and are as follows:

1. Where the decision of respondent Court is in conflict with applicable decisions of this Court or where such decision is in conflict with applicable decisions rendered by United States Courts of Appeals in other circuits, and in this circuit, this Court has jurisdiction on certiorari to review the action of respondent Court. (See Rule 38, subsection 5(b), Rules of the Supreme Court, and the cases of *Dept. of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 253, 85 L. ed. 1313, 1315; *Ansaldo San Giorgio I v. Rheinstron Bros. Co.*, 294 U.S. 494, 495-6, 79 L. ed. 1019; *Starr v. U. S.*, 153 U.S. 614, 38 L. ed. 841; *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 203, 204-5, 82 L. ed. 1292; *Triplett v. Lowell*, 297 U.S. 638, 644, 80 L. ed. 953; *Burtnett v. U. S.* (C.C.A. 10th), 62 Fed. (2d) 452, 456; *Sturcz v. U. S.* (C.C.A. 3d), 57 Fed. (2d) 90, 92; *Ward v. U. S.* (C.C.A. 9th), 4 Fed. (2d) 772, 3; *Pincolini v. U. S.* (C.C.A. 9th), 295 Fed. 468, 470; *Jackson v. U. S.*, 48 App. D.C. 272, 277, 278.)

STATEMENT OF THE CASE.

The incident out of which the indictment arose occurred in Anchorage, Alaska, about 8:45 A.M. on July 30, 1946 (R. 48). Petitioner, at that time, was the owner of a salvage yard where second-hand equipment was sold (R. 189). The complaining witness, Frank Rowley, was an electrical worker and at this time was engaged in installing an electrical system in Mt. View, Alaska (R. 171).

Petitioner and Rowley had had a previous discussion about the purchase of an oil tank (R. 171-172).

On July 30, 1946, at about 7:30 A.M., Rowley, together with one Ken Hinchey, went to petitioner's salvage yard in Anchorage, Alaska, for the purpose of purchasing and taking away the oil tank. Petitioner was not there at the time (R. 173). George Miles, an employee of petitioner, arrived at the yard shortly thereafter (R. 173). Rowley told Miles that he wished to buy the tank for $150 (R. 248). Miles replied that he thought this was a low price and asked Rowley whether he had talked to petitioner about it. Rowley said he had not. Miles then suggested that Rowley see petitioner about the price (R. 248). Rowley and Miles got into Rowley's pick-up truck and began to hunt for petitioner (R. 248). They first went to petitioner's house. He was not there. They went to the Alta Club (R. 190) and then circled back to petitioner's house and entered the back yard from the alley in the rear of the house (R. 190). Dave Foote, petitioner's truck driver and handyman, was in the back yard at the time (R. 190, 248).

Rowley and Miles entered the house through the rear door, crossed a hallway and knocked at a door leading to petitioner's bedroom (R. 181, 248). Petitioner came to the bedroom door and said, "What the hell is your hurry, can't you wait a few minutes?" (R. 248, 415). Miles told petitioner that Rowley was ready to take the oil tank from his junk yard, and that Rowley insisted that the purchase price was $150 (R. 191, 415). Petitioner maintained that the price of the tank was $250 (R. 191, 249, 416). After some argument between them over the price, and after Miles left the house and went into the yard (R. 191, 249), petitioner finally told Rowley the price was either $250 or nothing, and said: "Now, don't call me a liar in my own house." (R. 416, 192, 96). Rowley stepped outside the rear door and replied: "You are a liar." (R. 416, 90, 96). Petitioner at that time was standing in the doorway of his house (R. 90, 175).

Miles testified that when he was five or six feet outside the door, he heard petitioner tell Rowley that the latter could not argue with him in his own house. This was immediately after Miles had left the house (R. 249). Miles also heard petitioner tell Rowley, "You can't call me a liar" (R. 192). Furthermore, Rowley said something to petitioner that Miles could not hear, but Miles did hear petitioner immediately thereafter say, "Take off your glasses" (R. 249). Rowley took off his glasses and laid them on a stove just outside the door (R. 416).

Petitioner took off his glasses and put them on a box (R. 90). Both men put up their hands and started to spar (R. 91, 416, 127, 279).

At this time Miles and Foote were in the yard. Behind Rowley in the yard was a wood and trash pile (R. 78, Exhibits 1 to 4, R. 52-54) about two feet from the door of the house (R. 227). On the right of the yard, facing the alleyway, was a shed against which tools, implements and junk were strewn (Exhibits 1 to 4, R. 52-54; 97).

There is a conflict as to who struck the first blow. Petitioner testified that Rowley struck first (R. 416). Rowley claimed that petitioner struck first (R. 175); in this he was corroborated by Foote (R. 91) and Miles (R. 192, 249). Louis Strutz, who had driven into the alley for the purpose of picking up a carton from among the rubbish in the alley (R. 254), testified that Rowley was facing petitioner with clenched fists (R. 279).

The evidence is also conflicting as to the details of the altercation that followed. Petitioner testified:

> "As he took off his glasses and laid them down, we were sparring around (demonstrating)—we were hitting at one another and I was fast getting out of breath, and there were two or three blows he struck me that would have been counted. And as he hit me, I hit him on the left side, which caused him to turn around. I hit him and give him a shove and he got on the ground. He started to get up and I stepped back with my foot behind my—I grabbed ahold of the rake and lifted it up in this position" (R. 417).

Petitioner further testified that he grabbed the rake because he became winded grappling with Rowley and wanted him to stop—that he (petitioner) was through and wanted the fight to be through; that he wanted only to scare Rowley (R. 417) and did not strike him with the rake or with any other implement or weapon (R. 418).

Corroborating petitioner's contention that he was trying to withdraw and end the fight, is the testimony of Foote who said that as Rowley was falling the *first* time petitioner was backing away from him toward the door of his house (R. 91, 93).

All that Rowley recalls is that petitioner struck him once with his fist (R. 175) and he went backwards, rolled over on his left side and tried to pick himself up (R. 176) and that petitioner subsequently picked up an instrument and raised it over his head (R. 177).

Rowley felt a pain in his head (R. 177). However, he was unable to state definitely whether he felt this sensation of pain before or after he fell to the ground. (R. 178).

Miles, who, at the time of the trial had been discharged by petitioner (R. 189), testified that petitioner struck Rowley with a rake after Rowley was on the ground (R. 193, 249).

Foote testified petitioner hit Rowley with his right hand and that Rowley fell on his right side into the woodpile (R. 91, 96), rose two-thirds of the way up and again fell, this time on his left side, head first against the wall (R. 92, 93, 97, 98); that there were shovels, rakes and a pick up on a shed toward

which Rowley fell and that they were falling off the shed as Rowley fell toward it (R. 97).

While Foote testified he took a rake from petitioner's hand while Rowley was on the ground (R. 97), he repeatedly testified that he never saw petitioner strike Rowley with it (R. 97, 121). Moreover, Foote testified that after Rowley fell his head was resting on a blood-stained shovel (R. 112, 122) in a woodpile (R. 91) which contained a number of other tools (R. 110).

Strutz testified that although he saw petitioner wield a long-handled instrument, he did not see him strike anybody with it (R. 255, 259, 264, 265, 282).

Petitioner testified that he picked up a rake while Rowley was on the ground (R. 417-8).

There is an abundance of evidence substantiating petitioner's position that Rowley's injuries resulted from a fall into the woodpile while he was sparring with petitioner (R. 91, 96, 101, 115, 120, 121, 175, 417).

SPECIFICATIONS OF ERRORS RELIED ON.

1. Respondent Court erred in affirming the conviction of petitioner and thereby upholding the trial Court's action in giving Instructions No. 4D and No. 4 to the jury.

2. The action of Respondent Court in affirming the conviction is in conflict with comparable decisions of this Court, Respondent Court and other Federal Courts of Appeals of other circuits.

ARGUMENT.

1. **THE TRIAL COURT'S INSTRUCTION 4D WRONGFULLY ASSUMED THAT PETITIONER HAD COMMITTED AN ASSAULT UPON ROWLEY AND THAT PETITIONER HAD ATTEMPTED TO HIT AND INJURE ROWLEY WITH HIS FISTS, WHEREAS THESE MATERIAL FACTS WERE IN ISSUE, CONTROVERTED AND DISPUTED AND WERE MATTERS TO BE DETERMINED BY THE JURY.**

The trial Court's assumption is contained in the following language:

> "Even if you should believe that Rowley called the defendant a liar * * * the use of such words by Rowley * * * *would not justify an assault by the defendant upon Rowley.*" (Italics ours.)
>
> "It is no defense to the crime charged * * * that Rowley may have voluntarily entered into a fight with the defendant, *each* attempting to hit and injure the other with his fists." (Instruction 4D, R. 11.) (Italics ours.)

In the first part of the quoted instruction, the trial Court clearly assumed and informed the jury that petitioner committed an assault upon Rowley. In the second part, by the use of the word "each", the trial Court likewise assumed and informed the jury that petitioner attempted to hit and injure Rowley with his fists.

These were material facts in issue, controverted and disputed and were matters that should have been left to and resolved by the verdict of the jury.

Each question suggested by the evidence, whether offered by either side, should be submitted to the jury, regardless of whether the jury would accept the evi-

dence as true and regardless of the trial Court's opinion thereof.

McAffee v. U. S., 105 Fed. (2d) 21, 26;
Kinaid v. U. S., 96 Fed. (2d) 522, 526;
Martin v. Govt. of Canal Zone (C.C.A. 5), 81 Fed. (2d) 913;
Hendry v. U. S., 233 Fed. 5, 18;
Henderson v. State, 20 Ala. App. 124, 101 So. 88;
State v. Hatcher, 210 N. C. 55, 185 S. E. 435, 436;
Dilburn v. State, 16 Ala. App. 371, 77 So. 983;
Elliott v. State, 16 Ala. App. 464, 78 So. 633, 634.

In charging the jury, the separate elements essential to constitute the crime should be stated clearly to the jury in such manner as not to render it possible for the jury to think that any disputed fact is thereby assumed to be true. As a general rule, it is error for the Court, in its charge, to assume, either directly or indirectly, the existence or non-existence of any material fact in issue on which there is either no evidence, or on which the evidence is controverted, or, if disputed, is such that different inferences reasonably might be drawn therefrom.

Starr v. U. S., 153 U. S. 614;
Burtnett v. U. S., 62 Fed. (2d) 452, 456;
Sturcz v. U. S., 57 Fed. (2d) 90, 92;
Ward v. U. S. (C.C.A. 9th), 4 Fed. (2d) 772;
Pincolini v. U. S. (C.C.A. 9th), 295 Fed. 468;
Jackson v. U. S., 48 App. D.C. 272, 277, 278;

Peo. v. Lee Chuck, 74 Cal. 30, 36, 15 Pac. 322;
Peo. v. Williams, 17 Cal. 142;
Peo. v. Delgado, 28 Cal. App. (2d) 665, 83 Pac. (2d) 512;
Peo. v. Haack, 86 Cal. App. 390, 397, 260 Pac. 913;
Peo. v. Parish, 59 Cal. App. 302, 210 Pac. 633;
Peo. v. Woodcock, 52 Cal. App. 412, 199 Pac. 565;
Tarver v. State, 17 Ala. App. 424, 85 So. 855, 857;
Dilburn v. State, supra;
Marsh v. State, 125 Ark. 282, 188 S. W. 815, 816;
Bridges v. State, 169 Ark. 335, 275 S. W. 671, 672;
McAndrews v. People, 71 Colo. 542, 208 Pac. 486-8, 24 A.L.R. 659;
Dwyer v. State, 93 Fla. 777, 112 So. 62;
Bates v. State, 78 Fla. 672, 84 So. 373, 375-6;
Moore v. State, 53 Ga. App. 472, 186 S. E. 469;
Vincent v. State, 153 Ga. 278, 112 S. E. 120, 128;
Peo. v. Kallista, 313 Ill. App. 321, 40 N. E. (2d) 105, 106;
Gray v. Richardson, 313 Ill. App. 626, 40 N. E. (2d) 598, 600;
Peo. v. Biella, 374 Ill. 87, 28 N. E. (2d) 111, 112;
Peo. v. Browning, 302 Ill. App. 297, 23 N. E. (2d) 736, 737;

Peo. v. Celmars, 332 Ill. 113, 163 N. E. 421, 424;
Peo. v. Harvey, 286 Ill. 593, 122 N. E. 138, 142;
Hubbard v. State, 196 Ind. 137, 147 N. E. 323, 325;
State v. Cater, 100 Ia. 501, 69 N. W. 880, 883;
State v. Thornhill, 188 La. 762, 178 So. 343, 353;
Barber v. State, 125 Miss. 138, 87 So. 485;
State v. Mazur (Mo.), 77 S. W. (2d) 839, 840;
State v. Stewart (Mo.), 29 S. W. (2d) 120, 123, 124;
State v. Johnson (Mo.), 234 S. W. 794, 795, 796;
State v. Harrington, 61 Mont. 373, 202 Pac. 577, 578;
State v. Pitman (N. J.), 119 Atl. 438, 439;
State v. Lionetti, 93 N. J. L. 24, 107 Atl. 47;
Peo. v. Parretti, 234 N. Y. 98, 136 N. E. 306, 309, 310;
Colby v. State, 57 Okla. Cr. 162, 46 Pac. (2d) 377, 378;
Lunsford v. State, 53 Okla. Cr. 305, 11 Pac. (2d) 539, 540;
Walls v. State, 32 Okla. Cr. 108, 240 Pac. 146, 147;
State v. Andrews, 35 Ore. 388, 58 Pac. 765, 766;
Commonwealth v. Watson, 117 Pa. S. 594, 178 A. 408, 409;
Supina v. State, 115 Tex. Cr. R. 56, 27 S. W. (2d) 198;
Hughes v. State, 99 Tex. Cr. App. 244, 268 S. W. 960-1-2;

Redwine v. State, 85 Tex. Cr. App. 437, 213 S. W. 636, 637;

Webb v. Snow (Utah), 132 Pac. (2d) 114, 118;

State v. Hanna, 81 Utah 583, 21 Pac. (2d) 537, 539, 540;

State v. Seymour, 49 Utah 285, 163 Pac. 789, 792;

State v. Newman, 101 W. Va. 356, 132 S. E. 728, 734;

State v. Laura, 93 W. Va. 250, 116 S. E. 251, 252.[1]

As heretofore pointed out, in giving Instruction 4D the trial Court in effect stated to the jury that *petitioner committed an assault upon Rowley and attempted to hit and injure Rowley with his fists.*

In so charging the jury, the trial Court wrongfully assumed material and controverted facts that should have been left to the jury for determination.

Unquestionably the jury was misled and petitioner was prejudiced thereby.

By giving instruction 4D the trial Court singled out and gave undue prominence to controverted facts and favored the prosecution's theory. Such an instruction is calculated to mislead the jury and prejudice a defendant's rights.

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[1]A perusal of the instruction found faulty in these cases and a comparison thereof with instruction 4D in the case at bar vividly illustrates and emphasizes the glaring and most harmful consequences of such highly prejudicial instructions. See Appendix for illustrations of such prejudicial instructions and the respective courts' comments thereon.

In *Meadows v. U. S.*, 82 Fed. (2d) 881, 884, the instruction complained of read as follows:

> "You are further told that assault with bare fists only, does not of itself justify one, in repelling such assault, to resort to the use of a dangerous or deadly weapon, in a manner calculated to produce death or serious bodily harm."

Here the Court said:

> "* * * It is, of course, familiar law that 'to single out and declare the effect of certain facts without consideration of other modifying facts' will constitute prejudicial error."

citing

Weddel v. U. S., 213 Fed. 208, 210;
Urban v. U. S., 46 Fed. (2d) 291, 293;
Perovich v. U. S., 205 U. S. 86, 92, 27 S. Ct. 456.

To the same effect:

Lindsey v. U. S., 133 Fed. (2d) 368, 375;
State v. Brannon (W. Va.), 137 S. E. 649, 650;
State v. Johnson (Mo.), 234 S. W. 794, 795, 796.

In its opinion (page 6) the Respondent Court said:

> "A general criticism of 4-D is that it assumes on its face that appellant was the aggressor. The specific reason here assigned is that in giving this instruction the court *completely removed the issue of self-defense.*"

In the opinion the Respondent Court then considers in detail the issue of *self-defense* raised and discussed by petitioner in another portion of his brief. However, nowhere in the opinion has petitioner been

able to find any mention or discussion of the trial Court's wrongful assumption that petitioner *had* in fact committed an assault and *had* attempted to hit and injure Rowley with his fists.

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2. **THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 4, WHEREIN THE COURT DISCLOSED TO THE JURY THE LESSER PUNISHMENT WHICH MIGHT BE IMPOSED BY THE COURT FOR A VIOLATION OF THE INCLUDED OFFENSE OF ASSAULT, AND FAILED TO INDICATE TO THE JURY THE GREATER PUNISHMENT PROVIDED FOR THE CRIME CHARGED IN THE INDICTMENT, TO WIT, ASSAULT WITH A DANGEROUS WEAPON.**

This instruction could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the Court would impose the lesser punishment disclosed in the instruction; as a matter of fact, the Court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

In giving Instruction No. 4 (R. 8, 9) the trial Court instructed the jury on the crime charged in the indictment (assault with a dangerous weapon) and upon the included offense of assault, and concluded this instruction by reading to the jury Section 4779 of the Compiled Laws of Alaska defining the crime of assault, which included the following language:

> "* * * shall be fined not more than $500.00 or imprisoned in the federal jail not more than six months, or both."

Nowhere in its instruction did the trial Court inform the jury of the greater penalty provided for the offense charged in the indictment, i.e. assault with a dangerous weapon (six months to ten years in the penitentiary or one month to one year in a federal jail, or $100 to $1000 fine—Sec. 4778 Compiled Laws of Alaska).

After verdict the trial Court sentenced petitioner to three years in the federal penitentiary under Section 4778, supra.

Stating the lesser punishment for assault without likewise stating the greater punishment for assault with a dangerous weapon, tended to mislead and influence the jury and constituted prejudicial error.

The disclosure of a lesser penalty, without an accompanying disclosure of the greater, has been held to constitute an invitation to the jury to convict, in the belief that a penalty not greater than that disclosed would be meted out by the Court.

Miller v. U. S., 37 App. D. C. 138, 143;
Bethel v. State, 162 Ark. 40, 257 S. W. 740;
Mitchell v. State, 155 Ark. 413, 244 S. W. 443, 444;
Snyder v. State, 155 Ark. 479, 244 S. W. 746;
Pittman v. State, 84 Ark. 292, 105 S. W. 874-5;
Osius v. State, 96 Fla. 318, 117 So. 859, 861;
Bryant v. State, 205 Ind. 372, 186 N. E. 322, 325;
State v. Tennant, 204 Ia. 130, 214 N. W. 708, 710;

State v. Mayer, 204 Ia. 118, 214 N. W. 710, 712;
Abney v. State, 123 Miss. 546, 86 So. 341;
Peo. v. Sherman, 264 App. Div. 274, 35 N. Y. S. (2d) 171, 175;
Peo. v. Santini, 221 App. Div. 139, 222 N. Y. S. 683, 685;
Peo. v. Chartoff, 75 N. Y. S. 1088, 1089;
Bean v. State, 58 Okla. Cr. R. 432, 54 Pac. (2d) 675;
Commonwealth v. Switzer, 134 Pa. 383, 19 Atl. 681;
Ramirez v. State, 112 Tex. Cr. App. 332.

The danger in this type of instruction lies in the fact that the jury is directed away from the consideration of the evidence and toward speculation upon what the probable punishment will be. This point is well illustrated in the case of *Miller v. U. S.,* supra, where the trial Court among other things told the jury it was within the Court's power to mete out any kind of punishment—heavy to light—and on conviction inflicted the maximum punishment of twenty years on the defendant.

The Court said:

"While it is permissible for the trial court to caution the jury not to be influenced by the probable consequences of their verdict, as all responsibility after verdict is with the court, it is error for the court to put before the jury any considerations outside the evidence that may influence them and lead to a verdict not otherwise possible of attainment. The deliberations of the jury

should revolve around the evidence before them, and should be uninfluenced by other considerations or suggestions. The moment other suggestions or considerations find lodgment in their minds, that moment they stray from the path which the law has marked out, and their verdict, in consequence, does not rest solely upon the evidence. It is a colored and false verdict. When we consider that the existence of a reasonable doubt entitled a defendant to an acquittal and that a very slight circumstance may affect the verdict, the danger from putting before the jury anything that may improperly influence their deliberations becomes more apparent. It is an unpleasant duty for the citizen to be compelled to sit in judgment upon his fellow citizen and it is still a more unpleasant duty to be compelled to vote for his conviction. It is apparent, therefore, that if the jury receive the impression that the consequences of a conviction are not likely to be serious, such an impression, in a doubtful case, will be almost certain to affect the verdict, and where that impression is obtained from the court, the consequences are all the more serious, for the obvious reason that the jurors will assume that the court has some object in mind when it indulges in such an intimation."

Despite the fact that this erroneous instruction was brought to the attention of the Respondent Court of Appeals by petitioner and the error therein pointed out, no mention of nor reference to this instruction or to the authorities cited by petitioner can be found in the Respondent Court's opinion.

CONCLUSION.

We believe that the foregoing demonstrates that the decision and opinion of the Respondent Court of Appeals is erroneous and in conflict with decisions of this Court, and Respondent and other Courts of Appeals. Moreover, in each instance the decision of the Respondent Court is against the great weight of legal authorities in this country.

Dated, San Francisco, California,
February 16, 1949.

Respectfully submitted,
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(Appendix Follows.)

Appendix

In the following cases (cited pp. 25, 26, 27, 28, supra), the instructions were held faulty and prejudicial because the trial court, in its charge to the jury, wrongfully assumed controverted facts. The cogent portion of each instruction and opinion are set out.

Peo. v. Parish, supra.

Offense involved: Defendant was convicted of practicing a system and mode of treating the sick and afflicted without a valid, unrevoked certificate from the state board of medical examiners.

Instruction (pp. 303-304):

"You are instructed to disregard any statement or suggestions of counsel that chiropractors, or the practitioners of any other system of healing the sick, cannot procure a license to practice their system of healing in this state. And you are further instructed that it is no defense in this case for the defendant to argue or attempt to argue to you that the board of medical examiners of this state has discriminated against him. And in this connection you are instructed that the law of the state, besides other forms of license, provides for the issuance of a certificate which entitles the holder thereof to practice the chiropractic system of healing the sick. All that is required of the applicant for such a license is that he present to said board proof that he is possessed of the education required by law.

If the practitioner of any system or mode of the healing art, including chiropractic, has been by

the board of medical examiners of this state denied any right, he has his proper and adequate remedy therefor in another forum, and the jury in this case may not pass upon the same."

Opinion (pp. 304-305):

"There is nothing in the record to show that defendant had ever attempted to secure a license to practice chiropractic or any other system of healing or that his counsel had ever attempted to suggest that such a license could not be procured, or that the board of medical examiners had ever discriminated against him. * * * The only issue presented by the defendant's evidence was the defense that he had not been guilty of practicing any system or mode of healing requiring him to have secured a certificate. A fair interpretation of this instruction requires the construction that it assumed that the defendant had tried to convince the jury that he had attempted to secure a license to heal the sick. It is apparent that the jury may have considered it their duty to assume this to have been the fact and that they may well have regarded that circumstance as material and determinative of the issue as to whether or not the defendant actually did practice a system of treating the sick and afflicted. The instruction also assumes that the defendant had claimed discrimination against him by the board of medical examiners. Being aware that there was not evidence to support such a charge, the jury might easily be prejudiced against him because of having made so false and base a calumny. This would, of course, prevent that fair consideration of the evidence upon the material issues to which every defendant is entitled. It is unnecessary to

point out in greater detail the prejudicial character of this erroneous instruction."

Dilburn v. State, supra.

Offense involved: homicide.

Instruction:

"He (the defendant) would not be justified in using a deadly weapon if struck by the fist, or any other assault which would not likely cause serious bodily harm."

Opinion:

"This was in effect charging the jury that under the evidence the defendant was not justified in using a deadly weapon and *that the blow struck by the fists was not likely to cause serious bodily harm,* which was the very question then being submitted to the jury." (Italics ours.)

McAndrews v. People, supra.

Offense involved: murder.

Instruction:

"The court charges you that, if you believe from the evidence beyond a reasonable doubt that the defendant assaulted and unlawfully struck the said W. G. Keim upon a vital part of his body with great force and violence, and that such striking was, on account of the extreme age and debility of said W. G. Keim, and on account of its force, violence, and aim, an act which in its consequences would naturally and probably destroy the life of said W. G. Keim, and did in fact occasion his death, then you may infer that the defendant was actuated by malice in committing such act, without further proofs, for malice may

be implied when a person without any considerable provocation does an act naturally tending to destroy life. * * *"

Opinion:

"The objection is that the instruction assumes matters not in evidence. The testimony showed that the deceased had always been well, never had serious sickness. His son said he was 58 years old. He weighed 200 to 210 pounds. The reference, then, to his extreme age and debilitated condition is wholly without evidence to support it. Indeed, it is directly contrary to the facts as shown in evidence.

That jurors give great weight to every remark by a trial judge is common knowledge, and it has frequently been commented upon in reported decisions. When, then, this instruction was given, it was almost certain to produce in the minds of the jurors an impression that the court regarded the evidence as showing extreme age and debility on the part of the deceased. A juror would naturally conclude that he had overlooked some testimony and would accept the court's statement, as in accord with the facts * * *."

Bates v. State, supra.

Offense involved: Breaking and entering with intent to commit a felony.

Instruction:

"Certain parts of the confession have been allowed to go into the evidence. I charge you that in weighing the evidence you must take a confession with care and weigh it very carefully in your consideration of the testimony."

Opinion:

"Every admission or confession said to have been made by the defendant was denied by him, and it was a material fact for the jury to determine whether or not there had been a confession or an admission of facts or circumstances pointing to his guilt. In the instruction complained of the court assumed that this material fact had been proven. The rule laid down by this court is that 'A charge that a material fact to have been proven, when there is conflict in the proof as to such fact, is erroneous.' "

Moore v. State, supra.

Offense involved: Riot.

Instruction:

"Now, gentlemen, you take this case. You are not empaneled here to try whether the Ku Klux Klan is a good order or whether it ain't. You are here to try this man for an offense of riot committed by himself and one other or others."

Opinion:

"* * * it is error for the court to assume, or seem to assume, that the defendant participated in the riot."

Vincent v. State, supra.

Offense involved: murder.

Instruction:

"If you find that the deceased had threatened the life of the defendant, and had a pistol for the purpose of killing him, that would not justify the defendant in going to the deceased's place of busi-

ness with the intent to kill him, and, in pursuance of such intent, taking his life."

Opinion:

"The language, 'That would not justify the defendant in going to the deceased's place of business with the intent to kill him, and in pursuance of such intent, taking his life,' does amount to an expression or intimation of opinion by the court that the defendant went to the deceased's place of business with the intent to kill him, and in pursuance of such intent did take his life. As this instruction did assume as true these facts, it would for that reason be objectionable, and requires the grant of a new trial. * * *"

Peo. v. Kallista, supra.

Offense: simple assault.

Instruction:

"* * * and if the pointing of a gun towards the person of George Jockisch was deliberately done, and was likely to be attended with dangerous circumstances, * * *."

Opinion:

"The instruction assumes the pointing of a gun towards the person of George Jockisch. * * *"

Gray v. Richardson, supra.

Offense: Action for damages for personal injuries.

Instruction:

"The care and caution required of the plaintiff was such conduct and care and caution for her own personal safety in alighting from the car in

question as a reasonably prudent and cautious person would have exercised under the same conditions and circumstances, before and at the time of the alleged injury. * * *"

Opinion:

"As we have pointed out plaintiff alleged and offered evidence to show that she was injured while alighting. The defendants' answer averred and the evidence in their behalf was offered to prove that the injury occurred after she had alighted. Thus the point is controverted in the pleadings and the evidence thereon is in conflict. The instruction, therefore, in assuming that she was alighting from the car was highly prejudicial and our courts have held under similar circumstances that the giving of such an instruction constituted reversible error."

Peo. v. Celmars, supra.

Offense: Rape.

Instruction:

"The court instructs the jury if you believe from the evidence in this case that the defendant made an unlawful assault upon the complaining witness in manner and form as set forth in the indictment you have the right to take into consideration all of the facts and circumstances appearing in the evidence, and you also have the right to take into consideration the superior strength of the defendant at the time of the assault, if any is proven, and the suddenness of the attack, the manner in which the attack was made, if the attack was made in the daytime or the night time, the surroundings and place where the alleged at-

tack was made, and any and all other surrounding facts and circumstances appearing from the evidence."

Opinion:

"By this instruction the superior strength of the plaintiff in error and the suddenness of the attack were assumed as facts. These assumptions necessarily involved the precedent assumption that plaintiff in error had committed the assault. It is not the province of the court, in an instruction to the jury, to assume the truth of any controverted fact."

Peo. v. Harvey, supra.

Offense involved: manslaughter.

Instruction:

"The court instructs the jury, as a matter of law, that if one who is in an enfeebled physical condition is unlawfully assaulted and an injury is inflicted upon her which is mortal to her in her enfeebled condition, then, even though such injury would not have been mortal to a woman in good health, still the assailant is deemed in law to be guilty of murder or manslaughter, as the case may be."

Opinion:

"It is argued that this states a mere abstract principle of law not specifically applied to the facts in this case; that it invades the province of the jury, because it assumes controverted facts: First, an assault; second, that the injury was inflicted thereby; and, third, that the injury was mortal. Beyond question the instruction is faulty in assuming these controverted facts."

Barber v. State, supra.

Offense involved: Unlawful possession of intoxicating liquors.

Instruction:

"* * * that, if you believe from the evidence in this cause, that the defendant knowingly had in her possession or under her control intoxicating liquors as testified to by the witness Bonner, then she is guilty as charged, and it is your sworn duty to so find."

Opinion:

"This instruction assumes and in effect charged the jury that Bonner had testified that the whiskey found by him in the appellant's house was there with her knowledge and was in her possession or under her control, when he had not in fact so testified. His testimony, as hereinbefore stated, was simply that the whiskey was found in the appellant's house. Whether she knew the whiskey was there and whether it was in her possession and under her control were facts to be found by the jury from all the evidence in the case. The instruction should not have been given."

State v. Mazur, supra.

Offense involved: common assault.

Instruction:

"* * * if you believe from the evidence that at the time the defendants maimed or disfigured the prosecuting witness by assaulting prosecuting witness they had good reason to believe that the prosecuting witness was about to do them some great bodily harm, then in that case the defend-

ants would be justified under the law of self-defense, and you should acquit them; * * *"

Opinion:

"But few comments are needed to point out fatal error. Felonious assault and not mayhem is the issue, and 'maimed or disfigured' is assumed."

State v. Johnson, supra.

Offense involved: Having carnal knowledge of a female * * * of age of 17.

Instruction:

"The court instructs the jury that if you find * * * the defendant did feloniously assault and carnally know the witness, May White, at the time the assault was charged to have been made, was over the age of 15 years and under the age of 18 years, and that said May White was, at that time, an unmarried female of previously chaste character, and that the defendant was, at the time, over the age of 17 years, you will find the defendant guilty."

Opinion:

"The instruction is unfortunately expressed. If the words 'and if they further find' had been inserted after the words 'May White' where the name of the prosecutrix first appears, so as to read, 'and if they further find that at the time the assault was charged to have been made,' etc., it could not be said that the instruction assumed that May White, 'at the time the assault was charged to have been made, was over the age of 15 years and under the age of 18 years, and that the said May White was, at the time, an unmar-

ried female of previously chaste character.' But as it is written it makes these assumptions. Instructions should never assume controverted facts (citing case). They should be so explicitly adapted to the case that the jury cannot fail to understand the law as applicable to the evidence. When the court undertakes to instruct on a question of law for the guidance of the jury the instruction should guide them fairly." (Citing case.)

State v. Harrington, supra.

Offense involved: Selling intoxicating liquors.

Instruction:

"* * * that the state has elected to stand upon the evidence of the sale by the defendant of one pint of whisky about 8 o'clock of the evening of that day, when the witnesses Ryan and Van Wert were present."

Opinion: In holding that the instruction assumes the fact that Ryan and Van Wert were present and witnessed the sale, the court said:

"This was a comment upon the evidence, and an invasion of the province of the jury in its endeavor to ascertain the facts. That a court may not do this without depriving the accused of his absolute right to have the question of his guilt or innocence, not only of the particular crime charged, but every material incident included in it, passed upon by the jury, is settled by the decision of this court in State v. Koch, 33 Mont. 501, 85 Pac. 272, 8 Ann. Cas. 804, and kindred cases."

Colby v. State, supra.

Offense involved: Receiving stolen property.

Instruction:

"You are further instructed that if you find and believe from the evidence in this case beyond a reasonable doubt that at the time said clock was purchased by the said defendant that he knew that said clock had been stolen, * * *"

Opinion:

"The underlying vice in the foregoing instruction is in the assumption that the defendant purchased and received from the self-confessed thief the property in question. It clearly invades the province of the jury in that it assumes the testimony of the witness Baker to be true. * * *

The trial court is never warranted in giving an instruction which has the effect of determining controverted questions of fact. (Citing case.)

The law requires the court, not only to abstain from positive expression as to the weight of the evidence, but to avoid even the appearance of an intimation as to the facts, and to so guard the language of its charge to the jury, which is the law of the case, that no inference, however remote or obscure, may be drawn by the jury as to the weight of the evidence."

Walls v. State, supra.

Offense involved: Selling intoxicating liquor.

Instruction:

"You are instructed that it is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney, or to an agent, detective, or representative of either than it is to sell to any one else; and a sale made to such officer or agent or detective, though solicited by him

for the purpose of detecting the commission of the offense and of instituting prosecution therefor, is punishable the same as if the sale had been made to any other person and for other purposes."

Opinion:

"These instructions assume the sale of whisky. This was a controverted question, and the assumption by the court that the sale was made is prejudicial."

Hughes v. State, supra.

Offense involved: Unlawful transportation of intoxicating liquor.

Instruction:

"* * * Now, if you believe * * * that the whiskey found by the officer in the defendant's car was brought to the place * * *".

Opinion:

Instruction assumes defendant had whiskey in his car and that the liquid found was whiskey.

Redwine v. State, supra.

Offense involved: Murder.

Instruction:

"You are further charged that if you believe from the evidence that the defendant, Jewel Redwine, provoked the difficulty for the purpose of killing the deceased * * *

You are further charged that if you believe from the evidence that the defendant, Jewel Redwine, provoked the difficulty only for the purpose of whipping Eulon Ellis, * * *"

Opinion:

"The criticism is that this charge assumed the fact that appellant did provoke the difficulty, and that if he did it for the purpose of killing deceased, and under certain circumstances it would be murder, and under other circumstances it would have been manslaughter. The court is not authorized to assume any fact that is detrimental to the rights of the accused. If the issue of provoking the difficulty is in the case, the court must instruct the jury to first find that fact, * * *."

Webb v. Snow, supra.

Offense involved: Action to recover damages for alleged assault and battery.

Instruction:

"The court instructs you that if you believe from the evidence that the plaintiff was pregnant at the time she was *rendered unconscious* by the blow delivered by one of the defendants' employes, and as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child, you may award her money damages for the *loss of said unborn child.*" (Italics ours.)

Opinion:

"The foregoing instruction disregarded entirely the fact that there was considerable dispute and conflict in the evidence. The instruction, standing alone, would amount to an instruction to find in favor of the plaintiff if the jury found that plaintiff was pregnant at the time she was struck, and if they also found that a miscarriage resulted. The instruction assumes that defendants' employees were to blame for what occurred, and that

the evidence was uncontradicted as to the following: (1) That plaintiff was 'rendered unconscious' by the 'blow,' and (2) that she was knocked to the floor. The instruction is so worded that it indicated to the jury a belief on the part of the court that defendants' employees were blameworthy, irrespective of the acts of plaintiff. As stated in State v. Seymour, 49 Utah 285, 163 P. 789, 792: 'Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary.' "

State v. Hanna, supra.

Offense involved: Carnal knowledge of a female under age of consent.

This requested instruction was correctly refused:

"And you are instructed in this connection, that if the evidence offered and received in this case raises in your minds a reasonable doubt as to the presence of the defendant at the place *where the offense was committed, at the time of the commission thereof,* then your verdict should be for the defendant, not guilty." (Italics ours.)

Opinion:

"That it is error for the court in instructing the jury to assume as proven any material controverted fact is held by this court in State v. Seymour, 49 Utah 285, 163 P. 789, 792 * * * So thoroughly established is this principle that it seems

almost superfluous to cite authorities. When the instruction without qualification assumed that the offense had been committed, it thereby relieved the jury of the necessity of weighing the evidence and determining for itself that question. It was the province of the jury to determine whether the offense had been committed, and not for the court to assume it as a proven fact."

Peo. v. Haack, supra.

The instructions declared in effect that recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant.

Held: This instruction was erroneous and prejudicial as assuming recent possession of stolen property on the part of the defendant.

Peo. v. Woodcock, supra.

The court here noted that the instruction was unduly favorable to the prosecution's theory and carried the intimation on the part of the trial court that the facts supporting the prosecution's theory did in fact exist, and that the inferences which the law permits the jury to draw from the testimony were drawn by the court itself and embodied in the instruction in such a way that the jury must necessarily have assumed that the theory was a fact proved.

Peo. v. Williams, supra.

In this case an instruction contained the word "victim" and the court held it prejudicial because it seemed to assume that the deceased was wrongfully killed and was calculated to prejudice the accused.